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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

VELMA E. CARR,
Petitioner

vs

JAMES F. RUNYAN, et al,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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65 pp

I.

QUESTIONS PRESENTED FOR REVIEW

A.

Whether the District Court's Court-Ordered Dispute Resolution Process (Mediation), sanctioned by the U.S. Court of Appeals for the Seventh Circuit, was so flawed that it represents an abrogation of minimal procedural safeguards and a deprivation of property without due process of law and right to jury trial, requiring this court to exercise its supervisory power over the lower courts in order to assure a valid alternative dispute resolution process?

B.

Whether the United States Court of Appeals for the Seventh Circuit abused its discretion in affirming the district court's failure to grant Petitioner's attorneys' written Motion To Withdraw, filed prior to the enforceability hearing, and forcing a hearing on the issue of whether or not a settlement had occurred at mediation, where the attorneys advised the court that they had a conflict of interest and where Carr's attorney was forced to testify in the hearing contrary to Carr's position that no settlement ever occurred?

II.

LISTING OF PARTIES

A. Velma E. Carr, Plaintiff, a citizen of the State of Georgia.

B. James F. Runyan, Defendant, who purchased Mrs. Carr's property at tax sale.

C. Elbert Starks, Jr., Defendant, a contract purchaser of Mrs. Carr's property.

D. Linda K. Bloom, Defendant, Auditor of Allen County, Indiana.

E. Tim Berry, Defendant, Treasurer of Allen County.

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V.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED BY THE SEVENTH CIRCUIT COURT OF APPEALS

The case below was published in West's Federal Reporter, Third Series as Carr v. Runyan, 89 F. 3d 327 (7th Cir. 1996).

VI.

JURISDICTIONAL STATEMENT

(1) The judgment or order sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on July 8, 1996.

(2) The jurisdiction of this Court is invoked under 28 U.S.C.S. 1254(1).

VII.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 42 U.S.C. 1983, Civil Action for Deprivation of Rights, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia"

VIII.

STATEMENT OF THE CASE AND FACTS

In May, 1987, Velma E. Carr, a Georgia resident, sold her house located in Fort Wayne, Indiana, on contract to Albert Starks for $45,000.00. In June, 1988, Carr and her husband gave the Allen County Auditor written instructions to forward tax bills to the property in Georgia. The Auditor failed to forward the tax bills to Carr. Starks, who was obligated under the contract to pay the taxes, accumulated a large tax delinquency which led the County Auditor to sell the property at a tax sale to James Runyan in September of 1992. Since Starks failed to exercise his right of redemption, the County Auditor issued a final tax deed to Runyan. However, the Auditor failed to notify Carr of the tax sale.

Carr brought a diversity action for damages in federal district court, pursuant to 42 U.S.C. 1983, seeking to void Runyan's tax deed and quiet title in her name, alleging that the County Auditor and Treasurer, acting under color of law, wrongfully liquidated her real estate at a tax sale and wrongfully deprived her of her property without due process of law by failing to give her notice of the tax sale, the notice of redemption, and the notice that a tax deed would issue, as required by Indiana Code 6-1.1-24-4 and 5. She contended that this lack of notice deprived her of her rights, privileges, and

immunities guaranteed by the Constitution and laws of the United States, particularly her right not to be deprived of property without procedural due process of law guaranteed by the Fourteenth Amendment of the Constitution.

At the Preliminary Pre-Trial Conference on September 8, 1994, the District Judge ordered the parties to mediate the case and appointed a mediator, John Theisen. The written order to mediate provided as follows:

> At the time so arranged, counsel, the parties, and the appropriate officers or representatives of the parties ... who have full settlement authority, shall be present in person at the (mediation) unless their personal presence is excused by leave of court in which event they shall be continuously and immediately available for consultation by telephone with their respective counsel, or the mediator(s).

The mediation was held at Theisen's office on 10/25/94, but Carr, the only party Plaintiff, was not present. Carr's attorney never obtained leave of court excusing Carr's failure to attend, contrary to the District Court's order. She was not invited to attend nor advised that her attendance at the mediation was mandatory. (A-20.) Carr allowed her daughter, Vivian Sarver, to be present but gave her no settlement authority. (A-23-24) Prior to the mediation, Carr did speak with her attorney, Mike Harmeyer, by telephone but the only instructions she gave him was that she wanted her house, and gave him no monetary settlement authority.

At the mediation, Defendants offered Carr

$28,000.00, which was rejected. Carr's attorney, Harmeyer, without authority from Carr, then made a counteroffer of $29,000.00 which was accepted by the Defendants. Neither Sarver nor Carr authorized this counteroffer. (A-27) Nevertheless, Harmeyer settled the case. Although she had been advised to be available by telephone, Carr was not put on a speaker phone and the evidence was undisputed that no one ever conferred with Mrs. Carr during the mediation, or at the end of the mediation to obtain her consent to settle.

Sarver, Carr's daughter, was present at the mediation but neither she nor Harmeyer had written or oral authority to settle the case for money. Later, at the hearing in the district court to enforce the settlement, Sarver testified that Harmeyer had told her that her mother gave Sarver authority to act in her behalf. At the mediation, Sarver testified that her authority was limited to conveying a settlement offer to Carr, not accepting such an offer. (A-23-24)

When Harmeyer made the $29,000.00 counteroffer, Sarver did not have the opportunity to telephone her mother and neither the mediator nor Carr's attorney telephoned her. After mediation concluded, Sarver conveyed the $29,000.00 offer by telephone. Carr promptly rejected the offer. However, the mediator reported the settlement to the district court and when Carr refused to sign the settlement agreement, the Defendant's filed a Motion to Enforce the Settlement Agreement. (A-27, 35-36)

Since a conflict developed between Carr and her attorneys as to whether or not a settlement had occurred, Carr's attorneys filed a Motion To Withdraw prior to the hearing to enforce the settlement. However, the district court neither granted the motion to withdraw nor did it

continue the hearing, sua sponte, to enable Carr to obtain new counsel. Instead, it forced a hearing on the Defendant's Motion to enforce the settlement.

Carr's attorney was a proponent of the proposition that a settlement had occurred (A-40) while Sarver and Carr contended that a settlement had not occurred. Consequently, Harmeyer was reluctant to advocate Carr's position. His role at the hearing was passive. He never called Carr as a witness at the hearing. In fact, he called no witnesses. He also declined the district court's invitation to make an opening statement. (A-22) After the Defendants called Sarver as a witness, Carr's attorney did not cross examine her nor did he cross examine the mediator, Theisen. (A-28,32)

At the settlement enforcement hearing, the mediator testified that he had a concern that Carr was not present at the mediation and noted that the transcript of the recorded conclusion of the mediation did not reflect that Vivian Sarver was even present, or that she agreed to the settlement. Sarver testified that the person who was affected by the mediation, Carr, was not even telephoned. (A-29, 30, 31, 37) She thought she had let Harmeyer know by saying that her mother wanted the house, that she did not want to accept the $29,000.00 settlement (A-38) If she had known that she would not get a chance to convey the money offer to her mother and that her mother wouldn't get a chance to get to say yes or no at the end of the mediation, she would not have attended.

Charles Carr, Velma Carr's son, spoke up at the hearing, without anyone calling him as a witness, noting that Mr. Harmeyer was not speaking for his mother at the hearing because he had a conflict of interest. (A-33, 34) Harmeyer testified that he assumed that a settlement

had been reached, a contention rebutted by Velma Carr in her Affidavit, which is set forth in the appendix. (A-40) At the conclusion of the hearing the district judge noted that Velma Carr's attorneys hadn't had much to say on her behalf (A-34)

Finally, one of Carr's attorneys, Larry Burke, interrupted the county attorney's questioning of Carr's attorney Harmeyer by complaining that such questioning touched upon the attorney-client privilege, which they could not waive, and that is why both attorneys had hoped that Carr would have other counsel at the hearing to advise her about the attorney-client privilege. (A-39)

The district court enforced the settlement, and dismissed Carr's complaint with prejudice, ruling that a valid settlement had occurred. Carr filed a Motion for New Trial pursuant to T.R. 59 and a Motion To Set Aside Judgment pursuant to T.R. 60 which was denied on 4/13/95, and issued a written order, (A-11-19) resulting in Carr's timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit on 5/4/95. Carr filed her Appellant's Brief on 6/19/95. The case was argued on 12/6/95 and the Court of Appeals decided the case on July 8, 1996. (A-1-10)

JURISDICTIONAL STATEMENT REGARDING BASIS OF DISTRICT COURT'S SUBJECT MATTER JURISDICTION

Plaintiff, Velma E. Carr, was a citizen of the State of Georgia when she filed her two-count complaint in the United States District Court for the Northern District of Indiana on May 16, 1994. She alleged that her action to quiet title was a civil action between citizens of different states involving a sum in excess of $50,000.00,

exclusive of interest and costs, and therefore the District Court had subject matter jurisdiction pursuant to Title 28, United States Code, Section 1332.

All of the Defendants were either citizens of Indiana or governmental entities located in the State of Indiana.

Additionally, in Count II of her Complaint, Plaintiff stated a claim arising under 42 United States Code, Section 1983, alleging damages under the Civil Rights Act of 1871. The District Court had jurisdiction over the claim pursuant to 28 U.S.C. Sections 1331 and 1332. Plaintiff alleged failure by the Allen County Treasurer to give notice of a tax sale of her house which she alleged deprived her of property without procedural and substantive due process of law guaranteed by the Fourteenth Amendment.

JURISDICTIONAL STATEMENT REGARDING 7TH CIRCUIT COURT OF APPEALS JURISDICTION

The United States Court of Appeals for the Seventh Circuit has jurisdiction of this appeal pursuant to 28 U.S.C.A. Section 1291 because this is an appeal from a final decision of the United States District Court of the Northern District of Indiana, entered on the 13th day of April, 1995, by William C. Lee, Judge of the United States District Court for the Northern District of Indiana, Fort Wayne Division, which denied Plaintiff's Motion for New Trial pursuant to T.R. 59 and Motion to Set Aside Judgment pursuant to T.R. 60 of the Federal Rules of Civil Procedure.

The Court entered its judgment on the 13th day of February, 1995, dismissing Plaintiff's lawsuit. Plaintiff

then filed her Motion for New Trial and Motion to Set Aside Judgment on the 23rd day of February, 1995. That Motion was denied by the District Court on the 13th day of April 1995. Plaintiff then filed her Notice of Appeal on the 4th day of May, 1995.

Plaintiff's appeal of the final order of the District Court is an appeal from a judgment entered by the District Court that disposes of all claims with respect to all parties.

IX.

ARGUMENT

A.

REASONS WHY WRIT SHOULD BE ALLOWED

A.

Public policy favors out of court settlements, and state and federal courts throughout the country are now routinely ordering litigants to mediate their disputes before trained mediators. While this type of alternative dispute resolution is on the whole beneficial for the system of justice, by easing congestion in court calendars, Petitioner's failed mediation underscores the need to establish minimal procedural safeguards for federal court-ordered mediations so that the right of litigants to procedural and substantive due process are not sacrificed at the altar of expediency.

Unlike arbitration, which has clearly defined standards, the lack of clearly defined standards for mediations in federal courts invites abuse. Accordingly, Petitioner is asking the Supreme Court of the United States to intervene and exercise its supervisory power over the lower courts in order to protect the integrity of the federal system. Mu'Min v. Virginia, 500 U.S. 415, 114 L. Ed 2d 493, 111 S. Ct. 1899.

The United States Court of Appeals, in affirming the District Court's decision that a settlement occurred at the mediation, abused its discretion. The decision to settle is the client's to make, not the attorney's. United

States vs. Beebe, 180 U.S. 343, 352, 21 S. Ct. 371, 374; 45 L. Ed 563 (1901) The client's decision-making authority has recently been memorialized by ADR Rule 1.3, Indiana Rules of Court, adopted 1/1/92, which vests decision-making authority in mediations with the parties, not the mediator. Rule 2.7 (B)(1) mandates that the parties and their attorneys be present. Since Carr was neither invited to attend the mediation nor advised that her attendance was mandatory, and was not consulted during the mediation, the district judge abused his discretion by enforcing the alleged settlement because the parties, by not assuring Carr's presence and failing to obtain leave of the court to excuse her presence, violated the court's own order. Even if we assume that Defendants reasonably believed that Sarver had settlement authority, neither Carr nor Sarver ever approved the settlement at the mediation. Therefore, the mediation was fatally flawed.

While a mediation does not require the formalities of a trial, Petitioner is requesting that the Supreme Court exercise its discretion and establish certain minimal safeguards for federal court-ordered mediations in order to ensure that litigants are fairly treated, in accordance with minimal standards of justice. At a minimum, all parties should be present, and if the presence of any parties is excused, the representative party should have written authority to settle, or a written Power of Attorney, and at the conclusion of the mediation all parties or their representatives should sign a writing setting forth the terms of the settlement. If these standards had been in existence, and were a pre-condition to the determination that a mediated settlement had been reached, this appeal would never have occurred. The confusion surrounding the issue of

whether or not a settlement had occurred would have been eliminated.

Carr does not contend that the Writ should be allowed because the Court of Appeals erred in affirming the district court's holding that Carr's actions caused the contracting third parties to believe that Sarver had apparent authority i.e. the contracting parties reasonably believed that Sarver was an agent who had contracting authority. Carr does contend that the district court abused its discretion that a settlement ever occurred, since the only evidence of a settlement was the decision of Carr's attorney to settle without the consent of Carr or Sarver, who clearly viewed her role at the mediation more as a messenger than as a party authorized to accept a settlement offer. (A-41)

Consequently, the district court's dismissal of Carr's complaint deprived Carr of her right of due process of law as it had the effect of taking her property without providing her a right to her day in court on the constitutional issues raised in her suit.

Because of the general importance of mediation, perhaps the most widely used alternative dispute resolution in the 90's, there is a need for safeguards and Petitioner therefore requests that her Petition for Writ of Certiorari be granted.

B.

The United States Court of Appeals, although agreeing that the District Court should have granted a continuance of the enforceability hearing, sua sponte, under the circumstances of this case, affirmed the district court's decision not to grant Carr's attorneys Motion to Withdraw or to grant a continuance sua sponte prior to

the hearing. This resulted in a denial of due process because it left Carr with ineffective counsel and the inability to present her case regarding the issue of whether or not a valid settlement ever occurred, because of the conflict of interest between Carr (who maintained that she never agreed to a settlement), and her attorney, Harmeyer, (who was a proponent of the settlement).

By forcing the attorneys to stay in the case and forcing the matter to hearing, the hearing to determine whether or not a settlement occurred became fatally flawed and deprived Carr the opportunity to obtain alternate counsel. The Court's decision to deny Carr's attorneys their request to Withdraw also left Carr without an advocate. An indication of Harmeyer's reluctance to advocate Carr's position is his failure to call Carr as a witness at the enforceability hearing, failure to make an opening statement and failure to cross-examine any witnesses.

To require an attorney to undertake to represent conflicting interests creates a situation which should never occur under our adversary system of trying cases. Such a situation discredits the legal profession and lowers the dignity of the court. It should never be permitted since it may also force attorneys to violate the code of professional responsibility.

Clearly, the district court's decision denying Attorneys Harmeyer and Burke the right to withdraw based upon a conflict of interest (which the attorneys recognized prior to the hearing) is unreasonable and therefore was an abuse of discretion. By affirming the district court's decision denying withdrawal, the Seventh Circuit Court of Appeals erred.

Petitioner contends that she has been the victim of two flawed proceedings, the court-ordered mediation and

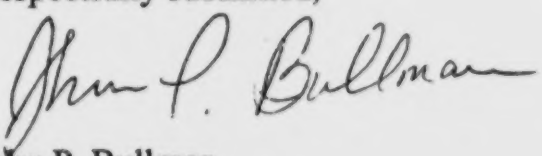
the hearing on the enforceability of the alleged mediated settlement. These proceedings have deprived her of her right to go to trial to vindicate her constitutional right to due process of law guaranteed by the Fourteenth Amendment of the Constitution which authorizes her to pursue a civil action for the deprivation of those rights.

X.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

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In The
United States Court of Appeals
For the Seventh Circuit

No.95-2088
VELMA E. CARR,

Plaintiff-Appellant,

v.

JAMES F. RUNYAN, ELBERT STARKS, JR., LINDA K. BLOOM, individually and as auditor of Allen County, Indiana, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division
No. 94 C 137-William C. Lee, Judge.

Argued December 6, 1995-Decided July 8, 1996

Before LAY,* CUDAHY, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Velma Carr contracted to sell a parcel of land, but before the buyer could make all the payments, he ran up a sizeable tax debt, and the county foreclosed on the property and sold it in a tax sale. When Carr filed a diversity action in federal district court to quiet

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* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

title in the land and to recover damages under § 1983, the judge ordered a mediation so that the parties might discuss a settlement. Carr did not attend the mediation, but she arranged for her daughter to attend on her behalf. At the mediation, Carr's daughter and the defendants reached an accord as to settlement, but when Carr learned of the agreement, she refused to go along with its terms. After a hearing, the district court ruled that the settlement was enforceable because Carr's daughter possessed apparent authority to enter into a binding agreement, and we affirm.

I. HISTORY

On May 7, 1987, Carr, a resident of Georgia, sold a plot of land located in Fort Wayne, Indiana, to Elbert Starks, Jr., for $45,000. The sale was on contract, meaning that Carr would retain title to the land until Starks satisfactorily completed all of his payments under the sale agreement. By the time Starks had made payments totaling roughly $22,000, however, he had accumulated a sizable property tax debt. Accordingly, the county auditor initiated a tax sale and sold the property to James Runyan in September of 1992. After Starks did not exercise his right of redemption within the required period, the county auditor issued a final tax deed to Runyan for the property.

When Carr later learned of the sale, she brought a diversity action in federal district court, seeking to void Runyan's tax deed and quiet title in her name because, she claimed, she had not been properly notified of the tax sale. Additionally, she sought damages under 42 U.S.C. § 1983, arguing that by depriving her of her property without proper notice, the county auditor and treasurer had violated

her constitutional rights to procedural due process, substantive due process, and the privileges and immunities of her Georgia citizenship.

At a preliminary pretrial conference on September 8, 1994, the district judge ordered the matter to be mediated in an attempt to encourage a voluntary settlement between the parties. The parties agreed on the appointment of John Theisen, a labor law attorney from Fort Wayne, to act as the mediator. The district court's order to mediate instructed:

> At the time so arranged, counsel, the parties, and the appropriate officers or representatives of the parties . . . who have full settlement authority shall be present in person at the [mediation] unless their personal presence is excused by leave of court in which event they shall be continuously and immediately available for consultation by telephone with their respective counsel, or the mediator(s).

Additionally, the district court's order required that "[t]he representatives in attendance should have the same level of responsibility and authority as one who would ordinarily be sent to a settlement conference conducted by the court."

The mediation was held at Theisen's office on October 25, 1994, and Carr was represented by her attorney, Mike Harmeyer. Carr did not attend the mediation personally, and there is no explanation in the record for her absence. Although Carr never obtained leave of court excusing her failure to attend, she arranged instead for her daughter, Vivian Sarver, to attend the mediation with Harmeyer.

According to Sarver's own testimony, Sarver went to the mediation to act on her mother's behalf. Immediately prior to the beginning of the mediation, Harmeyer spoke with Carr on the telephone, but neither Harmeyer nor Sarver spoke with Carr again until after the mediation had ended.

The mediation began at 1:00 P.M. and lasted six and a half hours, and during that time Harmeyer, Sarver, and the defendants and their counsel discussed various offers and counteroffers. Theisen testified that Sarver was active in these discussions. Near the end of the negotiation, the defendants proposed a settlement under which they would pay Carr $28,000 in exchange for her agreement to release her claim by transferring any and all interest she had in the property to Runyan. When Harmeyer discussed this offer with Sarver, she rejected it and asked him what he recommended. He recommended, and they subsequently proposed to the defendants, a settlement wherein Carr would receive $29,000 in exchange for her entire interest in the property. The defendants collectively agreed to this settlement counteroffer.

At that point, believing a settlement to have been reached, Theisen dictated the settlement agreement onto a cassette tape in the presence of the parties. Theisen began the dictation by noting that a settlement had been reached, and he outlined the terms of the agreement. Theisen then went around the table and individually asked each attorney, including Harmeyer, whether the dictated settlement terms accurately reflected the agreement approved by their clients, and the attorneys each responded in the affirmative. Neither Sarver nor any of the defendants present voiced opposition or disagreement to their attorney's representations. Theisen subsequently filed a report with

the district court announcing that the parties had reached a settlement and detailing the terms of the agreement.

The night the mediation concluded, Sarver called her mother to tell her what had happened, but according to Sarver, Carr insisted that she wanted her house and did not want to settle for any amount of money. The next day, Sarver called Harmeyer and told him that her mother wanted the house. Apparently, however, Sarver did not clearly convey the import of this statement because Harmeyer continued to believe that a settlement had been reached.

A month later, Harmeyer had completed a joint stipulation for dismissal with prejudice, and he forwarded this document to counsel for the defendants, pursuant to the terms of the settlement agreement. But on December 19, 1994, Carr made it explicitly clear to Harmeyer that she would not agree to the settlement agreement reached at the mediation. Thus, on December 20, Harmeyer filed various motions with the district court requesting the court to reset the case for trial. The defendants objected, and a hearing was scheduled for February 13, 1995.

At the hearing, the court heard testimony from Sarver, Theisen, Harmeyer, and Carr's son, Charles Carr. Although Carr was present at the hearing, she did not testify. Immediately prior to the hearing, Harmeyer submitted a motion to withdraw appearance, but the district court decided to postpone ruling on this motion until after the issue of the settlement agreement's validity was resolved. On more than one occasion, the district court asked the Carrs if they wished to have a continuance so that they could obtain different counsel, but they refused.

Sarver testified that her understanding of the phone call

between Carr and Harmeyer immediately preceding the mediation was that her mother would go along with whatever she (Sarver) thought best. However, in seeming contradiction to this statement, Sarver also explained that at the time of the hearing, she believed that no settlement agreement would be final until her mother was telephoned and had a chance to accept or reject the settlement. Finally, in contradiction to her statement that her mother was to approve any settlement agreement, Sarver testified that during the entire span of the litigation, her mother had maintained that she only wanted to keep her house and did not want to settle for money. Charles Carr also testified to the fact that his mother had simply wanted to keep her house.

Harmeyer and Theisen each testified that they understood Sarver to have had full settlement authority during the mediation and that, after the mediation, they believed a valid settlement had been reached. Harmeyer, however, could not testify as to the substance of the conversation he had with Carr prior to the mediation due to the attorney-client privilege.

Following the hearing, the district court orally rendered its ruling, finding that Sarver had possessed apparent, if not actual, authority to settle the case on behalf of Carr.

As a result, the court upheld the validity of the settlement agreement and entered a judgment dismissing Carr's claims with prejudice, as prescribed by the terms of the settlement. Within ten days of the entry of judgment, Carr filed a FED. R. CIV. P.59 motion for a new trial and a FED. R. CIV. P.60(b) motion to set aside the judgment, both of which the district court denied. Carr now appeals to this court, arguing (1) that the settlement agreement is

unenforceable because neither Sarver nor Harmeyer had the authority to bind Carr to an agreement settling her claims against the defendants, and (2) that the district court erred in not granting a continuance prior to the hearing so that Carr could obtain different counsel.

II. ANALYSIS

Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review. *Wilson V. Wilson, 46* F.3d 660, 664 (7th Cir. 1995). Thus, in considering a district court's decision whether to enforce a settlement agreement, including its threshold determination of whether the parties actually entered into a valid and enforceable agreement, we will not reverse unless the lower court abused its discretion. *Id.* Under this standard, we do not ask whether we would have ruled as the district court did were the question before us in the first instance, but rather whether under the circumstances the district court's decision was reasonable. *Anteveski V. Vokswagenwerk Aktiengesellschaft, 4* F .3d 537, 539-40 (7th Cir. 1993).

A settlement agreement is merely a contract between the parties to the litigation, wherein generally the defendants promise some partial remedy in exchange for the plaintiffs promise to dismiss the case and release the defendants from any future liability for their conduct that formed the basis of the dispute. As such, the formation, construction, and enforceability of a settlement agreement is governed by local contract law. *Laserage*

Technology Coro. V. Laserage Lab., Inc., 972 F.2d 799, 802 (7th Cir. 1992).

Under general principles of Indiana agency and contract law, a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had actual or apparent authority to bind him, or if the principal subsequently ratifies the agreement. *Northern Assurance Co. of America V. Summers,* 17 F.3d 956, 960 (7th Cir. 1994) (citing *Allegheny Mut. Casualty Co. V. Franklin,* 513 N.E.2d 658, 659 (md. Ct. App. 1987)); *Beneficial Mortgage Co. V. Powers,* 550 N.E.2d 793, 796 (md. Ct. App. 1990). Actual authority exists where the principal has in fact authorized the agent to enter into such a contract on behalf of the principal. *Northern Assurance,* 17 F.3d at 960 (citing *Indiana Dept. of Pub. Welfare V. Chair Lance Serv., Inc.,* 523 N.E.2d 1373, 1377 (md. 1988)). This authorization may be expressly conveyed orally or in writing, or it may be implied by actions of the principal that would lead a reasonable agent to believe that he possessed such authority *Id.*

Apparent authority, on the other hand, exists where actions of the principal give the other contracting party the reasonable impression that the agent has authority to enter into an agreement on behalf of the principal. *Id.* at 962 (citing *Pepkowski V. Life of md. Ins. Co.,* 535 N.E.2d 1164, 116~67 (md. 1989)). In such cases, the agent need not have actual authority, nor even believe that he has actual authority, so long as the principal's actions cause the contracting third party to reasonably believe that the agent has contracting authority. *Id.*

Finally, even where an agent has neither actual nor apparent authority, a principal may be bound by a contract

entered into by his agent if the principal subsequently ratifies the contract as one to which he is bound. *Beneficial Mortgage,* 550 N.E.2d at 796. As with actual authority, ratification may be express, where the principal overtly adopts the contract, or implied, where the principal both fails timely to repudiate, and accepts benefits under, the contract. *Id.* (citing cases).

All the parties agree that Carr did not ratify the settlement agreement, either expressly or impliedly. Although there is some question as to whether Carr repudiated the agreement one day or two months after the mediation conference, there is no evidence in the record that she ever formally adopted the agreement or accepted any benefits under the terms of the settlement. Thus, the settlement is enforceable only if Sarver had actual or apparent authority to bind Carr to an agreement disposing of her claims for relief.

The evidence is mixed concerning whether Carr gave Sarver the actual authority to settle the case on her behalf. Harmeyer explained that after speaking with Carr prior to the mediation, he believed Sarver had actual settlement authority. Unfortunately, the record does not contain the specifics of the conversation because Harmeyer was precluded by the attorney-client privilege from divulging the contents of the discussion, while Carr declined to take the stand at all. Sarver testified that her understanding of Harmeyer's phone conversation with Carr was that Carr would agree to whatever Sarver thought best in the mediation. However, Sarver also stated her contradictory belief that any settlement would be conditioned on Carr's final approval. Supposedly, Sarver believed this because her mother had always simply wanted the house and did

not want to settle for any amount of money. Yet, the facts that Carr was willing to sell the house to Stark in 1987 and that she allowed Sarver to participate in mediation negotiations designed to reach a settlement disprove the contention that, due to some emotional attachment, she wanted only to keep the house.

Nevertheless, we need not decide the issue of whether Carr gave Sarver actual authority to settle her case because the facts are clear that Sarver had *apparent* authority. Apparent authority exists where the principal's actions lead the contracting third party to reasonably believe that the agent has authority to bind the principal. *Northern Assurance,* 17 F.3d at 962. Here, the order to mediate clearly instructed that the parties and the parties' representatives "who have full settlement authority" were required to attend the mediation unless they obtained leave of court. Carr did not procure the court's permission for her absence, but instead arranged for Sarver to appear on her behalf. Due to Carr's actions in this respect, Theisen and the defendants were reasonable in believing that Sarver had authority to settle on Carr's behalf. Perhaps the defendants' beliefs would have no longer been reasonable had Sarver expressly disclaimed her authority, but she did not. On the contrary, the record indicates that she actively participated in the negotiations, including the ultimately accepted counteroffer, and that she did not object or voice any qualification when the parties dictated to cassette tape the terms of the agreed-upon settlement, nor did she ever ask to leave the meeting and call her mother. Thus, we cannot find that the district court abused its discretion in enforcing the settlement agreement and dismissing Carr's claims, pursuant to the terms of the settlement.

Carr's second argument on appeal is that the district court erred in failing to grant a continuance before the enforceability hearing so that she could obtain different counsel. Although we agree that granting a continuance would have been advisable under the circumstances of this case (Harmeyer had requested withdrawal due to a perceived conflict of interest), the district court asked Carr and her son on more than one occasion if they wanted a continuance, and each time they declined. Carr cannot now maintain that the district court committed reversible error by failing to ignore her refusals and grant a continuance *sua sponte*.

Finally, we do not address Carr's argument that the settlement is unenforceable because it was not filed with the clerk of the district court. Besides being wholly meritless under a proper reading of IND. CODE § 34-1-60-5, the argument is raised for the first time on appeal and is therefore waived.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

VELMA E. CARR,	)	FILED
	)	95 APR 13 AM 9:14
Plaintiff,	)	Geraldine J. Crockett, Clerk
	)	US District Court
V.	)	Northern District
	)	of Indiana
JAMES F. RUNYAN, et al.,)		
	)	CIVIL NO. 1:94cv137
Defendants	)	

ORDER

This matter is before the court on plaintiff's motion for new trial and motion to set aside judgment filed February 23, 1995. The defendants responded to the motion on March 9, 1995 and on March 15, 1995. Plaintiff did not file a reply. For the following reasons, the plaintiff's motions will be denied.

Discussion

On May 16, 1994, plaintiff Velma E. Carr ("Carr"), filed complaint to void tax title deed, to quiet title to land, and damages pursuant to 42 U.S.C. 1983. By order dated

September 29, 1994, this case was ordered to mediation. Attorney John C. Theisen was designated as the mediator. On October 25, 1994, mediation was conducted and, as a result, this case was settled as to all defendants except Elbert Starkes, Jr., with whom a tentative agreement was reached. Starkes later agreed to the settlement. Under the settlement, a total of $29,000.00 was to be paid to Carr in satisfaction of each and every claim for damages. Defendant James Runyan was to pay $20,000.00, defendants Linda Bloom and Tim Berry were to pay $7,000.00, and defendant Starkes was to pay $2,000.00.

On January 11, 1995, defendants collectively filed a motion to enforce the settlement agreement, and on February 13, 1995, this court exercised its jurisdiction pursuant to McCall-Bev V. Franzen, 777 F.2d 1178 (7th Cir. 1986) and conducted a hearing. After the presentation of evidence, this court determined that the settlement agreement should be enforced and dismissed this action with prejudice. Carr has now filed a motion for a new trial and a motion to set aside judgment, pursuant to Rule 59(a)(2) and Rule 60(b) of the Federal Rules of Civil procedure, respectively. Defendants Bloom and Berry and defendant Runyan have filed briefs in opposition to Carr's motions.

In support of her motions, Carr basically rehashes the argument she made at the February 13, 1995 hearing, where she claimed that she never agreed to settle her claim for $29,000.00. Carr also argues that she had been advised by Michael D. Harmeyer, her attorney at the time, that he would withdraw his appearance prior to the February 13, 1995 hearing, and so she assumed that she would be

granted a continuance in order to obtain a new attorney to assist her with the filing of a motion to set aside settlement. Plaintiff has provided her affidavit in support of her present motions. In her affidavit, Carr claims that she was not present during the mediation, was not contacted during the mediation, and was never advised of the $29,000.00 settlement figure during mediation. Carr further states that she never gave dollar settlement authority to Harmeyer, nor did she give dollar settlement authority to her daughter, Vivian L. Sarver, who was present on Carr's behalf during the mediation. Carr claims that she advised Harmeyer only that she wanted her house.

Vivian L. Sarver states in her affidavit that she did not agree to settle this suit for $29,000.00 during the mediation process. Sarver states that she authorized Harmeyer to present a counteroffer of $65,000.00 to settle the case, but that Harmeyer. refused to present her counteroffer to the defendants and refused to inform them that she wanted the house back.

Sarver further states that Carr was unrepresented by counsel at the February 13, 1995 hearing, as Harmeyer had filed his motion to withdraw and did not represent Carr at the hearing to argue against the enforcement of the settlement. Sarver states that the court should have continued the case to allow her to get another attorney as Harmeyer did not assist her with her request to have the settlement set aside. Additionally, Sarver states that an evidentiary hearing was not held "although the court interviewed the parties and appeared to have made up its mind as apparently all of the attorneys thought that a settlement had been reached." (Sarver Aff. at ¶ 15.)

Finally, Sarver states that "on February 13, 1995, when we appeared in Court; we assumed the Court would continue the matter to allow us to get an attorney since our present attorneys were withdrawing." (Sarver Aff. at ¶ 21.)

In her brief in support of her motions, Carr contends that this court's decision dismissing her lawsuit is contrary to law and to the facts, which Carr claims indicate that she never agreed to the settlement, and wasn't present during the mediation. Carr further claims that this court erred by not entering an order of withdrawal and continuing the matter in order to enable her to obtain new counsel who would file a motion to set aside the alleged settlement.

This court will first address Carr's claim that she assumed the court would continue the February 13, 1995 hearing. At the beginning of the February 13, 1995 hearing, this court made note of the fact that Carr's attorneys, Michael Harmeyer and Larry Burke, had filed a motion to withdraw. This court further informed everyone that Harmeyer and Burke were to remain as Carr's attorneys until after the issue of the enforcement of the settlement was decided. At the time of the hearing, no other attorney had entered an appearance on Carr's behalf.

Vivian Sarver was present at the February 13 hearing and she did not ask this court for a continuance. Moreover, when Mrs. Carr's son, Mr. Charles Carr, took the stand at the hearing, the court specifically asked him if he wanted the opportunity to hire another lawyer to represent his mother's interests in this proceeding. The court further informed him on two separate occasions that if he wanted to hire another lawyer, the court would give him the time to do so. Mr. Carr declined the court's offer to grant a

continuance. Additionally, near the conclusion of the hearing, the court asked if there was any additional evidence anyone wanted to present, or if anyone wanted additional counsel to represent them. No one responded to the court's inquiries in the affirmative. Thus, this court finds Carr's claim that this court acted improperly by not granting a continuance to be without merit. The record in this case clearly shows that Carr was offered a continuance and that the offer was declined.

The court will next address Carr's contention, as stated in Sarver's affidavit, that this court did not conduct an evidentiary hearing on February 13, 1995, but merely interviewed the parties. The record of the February 13, 1995, hearing shows that the defendants presented the testimony of Vivian Sarver and John C. Theisen. Mr. Harmeyer then called Charles Carr to the stand. Defense counsel promptly objected to Mr. Carr's testimony, arguing that his testimony *was* not relevant as he was not present during the mediation. However, this court permitted Mr. Carr to testify as it was obvious that he was an interested party. Finally, the defendants presented the testimony of Mr. Harmeyer.

Near the conclusion of the hearing the court asked everyone present if there was any further testimony that they wished to present. No one responded in the affirmative. However, after the court had orally rendered its decision on the motion to enforce settlement, Sarver and Mr. Carr requested the court to accept additional documents as evidence. Although exasperated at Sarver and Mr. Carr for not speaking up earlier, the court accepted

the documents and attempted to explain to Mr. Carr obviously unsuccessfully) that the case was settled and all of the issues in the case were resolved by that settlement.

Clearly, the hearing that took place on February 13, 1995 was an evidentiary hearing. The issue before the court on February 13, 1995 was whether a valid settlement had been reached on October 25, 1995. This court heard considerable evidence on this issue and then rendered its decision. Thus, Carr's claim that this court did not hold an evidentiary hearing is without merit.

Carr's last argument, that the facts and the law do not support this court's decision to enforce the settlement, is also meritless. The evidence clearly showed that Sarver had settlement authority during the mediation, and everyone present at the mediation knew that Sarver had this authority. In fact, without the presence of a person who has settlement authority, there is not much use in having a mediation conference in the first place.

Sarver testified to this court that Harmeyer called Carr from Theisen's office immediately before the mediation began. Sarver further testified that her mother told Harmeyer that she would go along with whatever Sarver agreed to. Harmeyer also testified that he believed that Carr had approved the settlement agreement. While it may be that Sarver and Carr honestly believe that Carr should have been offered more money, the fact of the matter is that no one made such an offer and Sarver and Carr were left with the choice of accepting $29,000.00 or continuing with expensive litigation.

The evidence also shows that Sarver did in fact accept the $29,000 00 offer on behalf of Carr. Specifically,

Sarver testified that she was present throughout the entire mediation and was present when Harmeyer told the defendants that Carr would be willing to accept $29,000.00 to settle the case. Although Carr and Sarver may be unhappy that they were not able to settle for a greater amount, that fact does not make the settlement invalid.

Moreover, at the conclusion of the mediation on October 25, 1994, Attorney Theisen dictated the terms of the settlement. The actual tape recording and a typed transcription were both admitted as exhibits at the February 13, 1995 hearing. These exhibits clearly show that the terms of the settlement were explicitly explained to everyone present at the mediation. After reciting the terms of the settlement agreement into the record, the following colloquy took place:

> THEISEN: Okay, at this point in time I want to to go around the table and ask everyone if they understand this Agreement and if they approve of it.
>
> * * *
>
> THEISEN: Mike Harmeyer, is this agreeable to you?
> HARMEYER: Yes.
> THEISEN: Okay, and its agreeable to your client, you've spoken with her about this?
>
> * * *
>
> HARMEYER: I have.
> THEISEN: And Mike Harmeyer, [are] the terms

that I have dictated with respect to Mr. Stark agreeable to you and your client?
HARMEYER: They are.

All of the above evidence conclusively supports this court's decision to enforce the settlement. The purpose of a mediation conference is to settle the case. In the present case, Carr was contacted before the mediation began, Sarver was vested with settlement authority, and negotiations were held for approximately six hours. At the conclusion of the mediation the terms of the settlement were recited in the record by the mediator with Sarver present and Sarver heard Attorney Harmeyer affirm that the settlement was agreeable to Carr. If Sarver had any question about this, she should have raised it then.

Carr has attempted to portray this case as one in which a "grave injustice" has been inflicted upon an elderly lady who lost a $65,000.00 house to "the system". This portrayal is completely unwarranted. Carr and her husband, who is now deceased, sold the house on June 1, 1987 to Starkes for $45,000.00. There has never been any evidence presented suggesting that the house was ever worth $65,000.00. Moreover, the evidence at the hearing showed that Starkes paid $1,600.00 as a down payment leaving a balance of $43,400.00, bearing the interest rate of 9%, which was to be paid in monthly installments of approximately $350.00 a month, with a balloon payment due on May 1, 1992. The record shows that Starkes paid his monthly payments to Carr for at least five years. Thus, it is undisputed that Carr received at least $22,600.00 for her house, including interest, before it was ever sold at the

tax sale[1]. The defendants have agreed to pay Carr $29,000.00. Thus, Carr will end up receiving at least $51,600.00 for a house she sold for $45,000.00, plus interest, in 1987. Although it is unfortunate that Starkes was unable to fulfill his duties under the land contract with Carr, Carr has fared well under the present settlement and has not been subjected to a "grave injustice".

Conclusion

For all of the foregoing reasons, plaintiff's motion for new trial and motion to set aside judgment are both hereby DENIED.

Enter: April 13, 1995.

"s/ William C. Lee".
William C. Lee, Judge
United States District Court

---

1 Carr's house was sold at a tax sale after a public auction which was held on September 91 1992. Defendant Runyan was the highest bidder with a bid of $2,921.45, the amount of taxes then owing. While not conclusive evidence, it seems highly unlikely that Runyan would have been able to buy a $65,000.00 house at a public auction with a bid of under $3,000.00.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

VELMA E. CARR,	)	
	)	
Plaintiff	)	CIVIL NO. 1:94-CV-137
	)	
vs.	)	
	)	
JAMES F. RUNYAN, et al	)	
	)	
Defendants	)	

AFFIDAVIT OF VELMA E. CARR

Velma E. Carr, under penalties for perjury, states:

1. That I reside at 1565 County Line Road, Mansfield, Georgia and I am 78 years old.

2. That I am the Plaintiff herein but was not invited to attend or advised that my attendance at the October 25, 1994 mediation was required or mandatory.

3. I was advised to be available by telephone during the mediation process, and I do recall a time when I listened in to a conference but don't know if it was the mediation.

4. I spoke to Mr. Harmeyer before the mediation and he explained what the mediation was all about.

5. I advised him only that I wanted my house.

6. At one point, I believe in the days after the mediation, Mr. Harmeyer mentioned the figures $29,000.00 and then $22,000.00, I asked "is the money tax free", he gave me no answer, and I did not agree to settle for those amounts.

7. I allowed my daughter, Vivian L. Sarver, to be present for me at the mediation but gave her no specific settlement authority.

8. I assumed that Mr. Harmeyer would telephone me if there were any specific dollar amounts which required my consent but I was never asked during the mediation if I agreed to a settlement of $29,000.00.

9. I wanted only my house, not money.

10. This affidavit is made for the purpose of setting aside the order of the Federal Court enforcing the settlement and to obtain a rehearing to prevent evidence as to lack of settlement and/or settlement without my authority.

11. I spoke to my daughter, Vivian L. Sarver, and she advised me that she never authorized $29,000.00 settlement and that any settlement was without her authority and certainly not with my authority.

:s/Velma E. Carr"
Velma E. Carr

I affirm under penalties for perjury that the above information is true and correct.

:s/Velma E. Carr"
Velma E. Carr

Dated: February 22, 1995

Prepared by:

John P. Bullman
Attorney No. 2985-02
BULLMAN LAW OFFICE
1014 Webster Street
Fort Wayne, Indiana 46802
(219) 422-4042

because Indiana law dictates the settlement of those actions and again all settlements are enforceable under Indiana law. We would bring to the Court's attention that what we've gathered is a basis of the failure to move on with the settlement is that the plaintiff does not feel apparently there's a sufficient settlement now. And as I stated -- we stated in our motion, insufficiency is not a reason to back out of the settlement.

THE COURT: All right. Thank you.

MR. SPIELMAN: Thank you, Your Honor.

THE COURT: Mr. Harmeyer, do you have an opening statement you'd like to make?

MR. HARMEYER: Your Honor, I believe Mr. Spielman was accurate in his chronology of the events leading through today.

On December 19th, 1994, Mrs. Carr served Larry Burke and I with written notice that she did not wish to proceed with the settlement, which or at least did not wish to be a party to any settlement which was reached on October 25th.

THE COURT: And do you have that

to represent your mother?
A Well, we talked on the phone. Mike talked to her on the phone to tell her what was going to be going on.
Q Was this before you went down to the mediation?
A This was in the office in the conference room I guess.
Q Of Mr. Theisen?
A Yes.
Q Okay. Were you there?
A Yes.
Q Did you hear the conversation?
A Yes.
Q Okay. So Mr. Harmeyer explained the process?
A Yes.
Q Okay. Did eventually he get some authority to settle this matter? What I'm asking is was there some kind of exchange as to how much perhaps this matter could be settled for?
A Oh, no. No, no, no. There was no amount given on the phone as far as what this could be settled for. She wanted her

house.
Q She wanted the house back?
A Oh, yeah. That's what she's always wanted, the house.
Q And that's what she told Mr. Harmeyer?
A I think so. I didn't hear her end of the conversation. I don't know whether she told him that or not.
Q Okay. Did you have any kind of authority to settle it on her behalf?
A I think she wanted me to -- I think she told him that she would -- to go along with whatever I want -- I agreed on.
THE COURT: Your mother told Mr. Harmeyer to go along with whatever you agreed on?
THE WITNESS: Well, I think more or less that I was here and that she would leave it up to me I guess. I'm not sure, since I didn't hear her end of it, but I think that's what it was.
BY MR. SPIELMAN:
Q You weren't on a speaker phone?
A No
Q Did Mr. Harmeyer tell you that's what she

said?
A Yes.
Q Was Mr. Harmeyer's representation to you that you could settle this matter for whatever you believed was right; is that correct?
A To act in her behalf.
Q So you had authority according to Mr. Harmeyer to act in her behalf?
A Right.
Q At this mediation?
A Right.
Q Including accepting a settlement offer?
A If it was what she had wanted, yeah.
Q Well, wait a minute. You have this authority or not?
A Well, I'm saying she -- in a mediation, I don't care whether it's mediation or whatever, something like that you come to an amount that you think is to be accepted.
Q And you had authority to accept that amount?
A Then she should be called to find out whether that is agreeable with her.
Q Oh, so it was -- you had a condition to

accept it contingent on her final acceptance?

A That was my understanding is the way it was supposed to be done.

Q Okay.

A Because whether I was there or not, it is still her decision, her house.

Q Okay.

A If she wanted me to accept a certain amount of money, then after all this was over, then she should be called to say well, is this --

Q All right

A -- what you want?

Q How many phone calls were made from Mr. Theisen's office?

A You mean to her?

Q Yes.

A Just one.

Q And that was the one with us you had?

A Yes

Q No others were made during the course of the day?

A No.

Q You remember how long we were there?

get together on what we wanted. We wanted the house. Everybody else wanted a settlement.

THE COURT: You understood he was offering to settle on your behalf and your mother's behalf?

THE WITNESS: Yes.

THE COURT: For twenty nine thousand?

THE WITNESS: Yes. I also knew I was going to call my mother to find out if that's what she wanted, tell her the amount that was being offered and see if that's what she wanted.

THE COURT: All right.

THE WITNESS: But she was never called afterwards. I called her when I got home to find out about that and then I called Mike at the office the next morning to tell him how she felt about that.

THE COURT: Well, we'll get into that I presume.

MR. SPIELMAN: Well, we'll get into it now.

THE COURT: All right.

BY MR. SPIELMAN:

was a done deal and yet two months later we finally get this new motion?
Can you explain the two-month lapse?
A I have no idea about the two months lapse, other than the fact it took everybody so long to get the paperwork back to him.
Q Well, if you weren't going to settle the case, why were you worried about paperwork?
A I don't know. But yes, he was informed that she still wanted her house.
MR. SPIELMAN: Your Honor, may I have a few minutes?
THE COURT: Yes
MR. SPIELMAN: Your Honor, we have no- -
THE COURT: Do you have any cross examination, Mr. Harmeyer?
MR. HARMEYER: No, Your Honor, I do not.
THE COURT: All right. You may step down. Thank you. You may call your next witness.
MR. SPIELMAN: Your Honor, defendants would now call John Theisen.

A Yes.
Q Was it your understanding she was representing Mrs. Carr?
A That was my understanding.
Q How did you get that understanding?
A From my participation as a mediator and through the representations that she made to me, through the representations that Mr. Harmeyer made to me, and I did know -- when I did become aware that she was in contact at some point during the day with the plaintiff also and my telephone records which you've subpoenaed reflect that.
Q Okay. What authority did you understand she had to represent Mrs. Carr?
A At the outset, I wasn't quite sure, but by the end of the mediation, it was -- because that was a concern that the plaintiff wasn't there, at the end of the mediation it was clear to me that both Mr. Harmeyer and the woman who was with him -- I don't recall her last name --
THE COURT: Mrs. Sarver.
THE WITNESS: Mrs. Sarver, that's correct. Thank you, Your Honor. That

a material portion. There was a very small blurb in there that couldn't be understood. Except for that, it's an accurate transcript.

Q And that transcript reflects what you dictated in the evening of October 25th, 1995, following the mediation?

A Yes, it does.

THE COURT: Were the parties present when you dictated that?

THE WITNESS: Yes, they were, Your Honor.

THE COURT: All right.

MR. SPIELMAN: I'd move for the admission of A.

THE COURT: All right.

BY MR. SPIELMAN:

Q Was Mr. Harmeyer present during that dictation?

A Yes, he was.

Q Was Ms. Sarver present?

A I believe she was, but I'll say this, the transcript doesn't reflect it. It does reflect that he was there, and my recollection, as my recollection serves me,

Q So there was some conditions or contingency' on the settlement, that being the County's approval, Mr. Stark's ultimate approval?
A Yes, but the County's approval was -- it. wasn't -- they had already approved of it, they simply had to submit a claim form and get it approved through normal channels. They saw no reason why that wouldn't be taking place down the road. To me it seemed was lust a formality.
Q And Ms. Sarver and Mr. Harmeyer were aware of all of that?
A As I recall, she was present -- I went around the room and had everybody talk about it. The terms on the transcript of my dictation does not reflect her presence there or her agreement to it, but I do have Mr. Harmeyer's specific agreement and I asked him specifically if this was agreeable to his client and had he spoken to her about this and he said, "Yes, I have."
Q Did you subsequently file a report with the United States District Court for the Northern District of Indiana?

you have anything?
MR. ADAIR: Nothing.
THE COURT: Mr. Harmeyer, do you have any questions?
MR. HARMEYER: No questions.
THE COURT: Thank you. You may step down.
MR. THEISEN: Excuse me, Your Honor. was subpoenaed with some other documents. Do you need anymore of those documents?
MR. RENZ: Can we have an extra copy of your transcript?
THE COURT: I assume there's no reason for you to maintain the tape, Mr. Theisen, because the transcript, Exhibit A, has been admitted and you've testified that's an accurate representation of the tape so --
MR. THEISEN: Thank you, Your Honor.
THE COURT: Just for your information, I, don't see any reason for us needing the tape, unless you want the tape maintained Mr. Harmeyer?
MR. HARMEYER: Yes.
THE COURT: All right. Why don't you do this. Let's add the tape let's call it

MR. CHARLES CARR: Mmm-mm.
THE COURT: The lawyers have spent a lot of time on it. So we are at this process of trying to decide whether or not in fact the case was settled on October 25th.
MR. CHARLES CARR: Okay.
THE COURT: That's the issue before the Court now, not the cause of action that did or did not exhibit as a result of the alleged improprieties of the defendant.
MR. CHARLES CARR: I understand that. I understand exactly where we're at now, but that's what I'm trying to say. The issue that was first at hand has gotten completely scattered and --
THE COURT: No, it hasn't at all. It been been merged into these proceedings.
MR. CHARLES CARR: Okay. And what it feels like is there is one person with whoever may speak for her and now Mr. Harmeyer can't even, because it's some conflict of interest or something, and it seems as though we're witnessing another -- Just a bystander and observers as watching

this process come at her.
THE COURT: Well, do you want the opportunity to hire another lawyer to represent her interests in this proceeding? If you do, I'll give you that time.
MR. CHARLES CARR: We have --
THE COURT: I purposely did not grant Mr. Harmeyer/Mr. Burke's motion to withdraw so they could be here to represent her.
MR. CHARLES CARR: Okay.
THE COURT: And now so far, they haven't had much to say on her behalf. But maybe that's because there isn't much to say.
Is there anything to dispute that you know of about the testimony that your sister offered and the testimony Mr. Theisen offered?
MR. CHARLES CARR: The only thing -- there is nothing to dispute. They were just singing from two different sheets of music. Mother wanted the house, attorneys misguided that effort.
THE COURT: Well, that may --
MR. CHARLES CARR: But the point is,

to all the trouble to spend six and a half hours to engage all of these lawyers and the lawyer who acts as the mediator who is paid in part by the parties --

MR. CHARLES CARR: Right.

THE COURT: -- they each split that fee, is because that's the opportunity to settle the case.

MR. CHARLES CARR: Okay. Well, as I was trying to say, the point that she understood it was when she was given the information over the phone, what my mother accepted was yes, I accepted this is your final proposal, because it seems they were going nowhere further with it. I accept this is where they're going to rest their offers in accepting. I accept that bid. I'll consider that bid and I don't know how that -- and that's where she's at with it. So in considering whether she wanted to accept that offer, the answer came up to be no.

THE COURT: When did that answer come up?

MR. CHARLES CARR: The day in time that

she came up with, I can't say. All I know is she never once strayed in her initial point of wanting her home, which by some means has been relieved from her at this point.

THE COURT: Well, now when you say her home, this a home she sold on contract six or seven years ago.

MR. CHARLES CARR: It wasn't purchased yet. It was just in the process. So it hadn't been consummated.

THE COURT: Well, the contract sale had been consummated, hadn't it?

MR. CHARLES CARR: No.

THE COURT: That's not what I understood the evidence to be.

MR. CHARLES CARR: Well --

THE COURT: I understood your mother had sold the house on contract to Mr. Starks.

MR. CHARLES CARR: But the house was still in mother's name.

THE COURT: She hadn't been paid in full for it, but it had been consummated in that Mr. Starks had a right to buy the house

on your behalf and he agreed to the settlement. Did you understand that?

MS. SARVER: I guess he agreed.

THE COURT: Now, wait a minute.

MS. SARVER: You did agree.

THE COURT: Would you like to read a transcript of it?

MS. SARVER: If he says he agreed, I --

THE COURT: Well, I want you to -- if there's any question in your mind about whether he agreed, I'd be happy to have you read the transcript.

MS. SARVER: No, there's no question. I mean, what I'm saying is now, is it unusual when you come to an end of something like that, is it unusual to call the person that's being represented, find out if they go along with --

THE COURT: The assumption Mr. Theisen made was that had been done.

MS. SARVER: At the beginning.

THE COURT: Well, but you -- did you understand that everybody agreed to this settlement, including Mr. Harmeyer at the time Mr. Theisen went around the room as

involve folks who want something else, but they're wiling to agree to settlement. That's the whole point of settlement.

MS. SARVER: That's what I'm saying. misunderstood as far as, I mean, I was thinking I was letting him know that she did not want the settlement.

THE COURT: But in fact what you told him was she still wanted her house, she still wanted her house?

MS. SARVER: Yes, yes. So like I say, that on my part was not conveying to him that her wanting the house meant she did not want the settlement. And I did not say it that way.

THE COURT: All right. If there's anything further you want to present or you want additional counsel to represent you. I think one thing you have to face up to is that one way or the other if my conclusion were to be that the settlement was not finalized you're going to have to get additional counsel to prosecute the lawsuit. But I presume you explored that with Magistrate Judge Cosbey this morning before

there was a settlement of the action?
A Yes.
Q What were the terms of that settlement?
A It was my understanding that the plaintiff would receive a combined total of $29,000 cash in exchange for a complete release of all claims, dismissal of the action and execution of quitclaim deed.
Q Was it your impression your client had approved that?
A Yes, it was.
Q Why did you have that impression?
MR. BURKE: Your Honor, we may be touching upon the attorney/client privilege at this point, and it's not up to Mr.Harmeyer and myself to any way waive that privilege. That's up to Mrs. Carr. That's one of the reasons we were very hopeful she would have other counsel today to advise her about that.
MR.. SPIELMAN: Your Honor, I think the privilege has already been waived. Ms. Sarver is clearly not the client here. a number of conversations have taken place between Ms. Carr and Mr. Harmeyer in the

A The terms of the settlement agreement, which I understood required the preparation and execution of a loint stipulation of dismissal, which we contemplated would be signed by all parties or their counsel, and at the mediation session I agreed to accomplish that task and that's what was done on November 21st.

Q So the letter's dated November 21st and that's when you prepared these documents and sent them?

A Correct.

Q If you did not think a settlement had been agreed to, you would not have sent those documents; is that correct?

A On November 21st, 1994, I thought and was still under the assumption there had been a settlement reached and --

Q Okay.

MR. SPIELMAN: We have nothing further of this witness.

THE COURT: Any further testimony you want to offer, Mr. Harmeyer or Mr. Burke, do you want to ask Mr. Harmeyer any questions?

MR. BURKE: I have no questions of him,

whatever reason, be it family discord, which may be apparent by Mr. Carr's own testimony, family discord or whatever, they now want to back out of the settlement that all parties had agreed to.

THE COURT: Mr. Harmeyer, anything you wish to present on behalf of Mrs. Carr?

MR. HARMEYER: Your Honor, if I understand I am still counsel of record. I would like to give Mrs. Carr or her son Charles or anyone else to speak on behalf of the plaintiff.

THE COURT: All right.

MR. HARMEYER: If there's any closing that anyone wishes to make.

MS. SARVER: Well, did I want to say that if --

THE COURT: Mrs. Sarver for the record. Go ahead.

MS. SARVER: If I had known that my mother wouldn't get a chance to say yes or no after the mediation session, I wouldn't have been willing to act in her behalf because I would have thought that at the end of that call her say, is this all right with